IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1356

REINALDO FLECHA, et al.,

Petitioners,

v.

F. RAY MARSHALL and LEONEL CASTILLO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, REINALDO FLECHA, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on December 28, 1977.

OPINIONS BELOW

The order of the United States District Court, Toledo, J., granting preliminary injunctive relief and entered on the 15th day of August, 1977, is attached hereto as Appendix A.

The opinion and order of the United States Court of Appeals for the First Circuit per Aldrich, J., entered on December 28, 1977, is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1977. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION OF LAW PRESENTED

1. Whether the United States Secretary of Labor and the United States Commissioner of the Immigration and Naturalization Service have violated the Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.*, by construing that Act and the regulations promulgated thereunder so as to deem unavailable for employment all United States workers who seek wages and working conditions higher than those minima contained in the foreign worker regulations at 20 C.F.R. §§602.10-.10b?

2. Whether the above construction interferes with the right of United States workers to bargain with their employers over wages and working conditions, as guaranteed by the United States Constitution and federal and state law.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions involved in this case are set forth in Appendix C.

1. 8 U.S.C. §1101(a)(15)(H)(ii).
2. 8 U.S.C. §1184(c).
3. 29 U.S.C. §§49 *et seq.*
4. 8 C.F.R. §214.2(h)(3).
5. 20 C.F.R. §§602.10-602.10b.

STATEMENT OF THE CASE

Recruitment for apple pickers by East Coast apple growers occurs from April to July each year. During that same period in 1977, 6,750,000 U.S. workers were unemployed.[1] One hundred forty thousand of these unemployed workers were agricultural workers.[2] In Puerto Rico, alone, there were 2,000 to 4,000 unemployed farmworkers.[3] Yet, in 1977, apple growers obtained 4,000 to 5,000 temporary foreign workers[4] to pick their apples. These foreign workers were used instead of an equivalent number of U.S. workers because U.S. workers had sought to negotiate a wage-benefit package which was $.05 per hour higher than the apple growers were willing to offer.[5] The use of 5,000 foreign workers to pick apples deprived

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1. Bureau of Labor Statistics (U.S. Department of Labor), "Employment and Earnings," Vol. 24 No. 5 (May 1977), p.5. This total represents 7% of the work force.

2. Bureau of Labor Statistics, *Op cit.*, p.44, indicated an unemployment rate of 12.3% among hired agricultural workers. (Hired agricultural workers do not include farm operators and unpaid family members.) There were 1,157,300 hired agricultural workers in the April-July, 1977, period.

3. "U.S. Ordered to Admit 5,000 Foreign Workers," WASHINGTON POST, September 1, 1977, p.A1.

4. See Section A of the Petition for a description of the temporary foreign worker program.

5. The contract consisted of a wage rate plus the following three fringe benefits: (1) three hot meals per day, (2) the procurement of a performance bond by the employer, and (3) a non-occupational group health insurance policy. The record of this case clearly reflects that the three fringe benefits would cost each employer no more than a total of $.05 per hour per worker. Hereinafter, petitioners will refer to this $.05 per hour as either a "wage demand" or a "wage-benefit package."

5,000 U.S. workers of a total wage of $5 million.[6] Moreover, much, if not most, of the money earned by the Jamaicans who picked apples was sent to, and spent in, Jamaica.[7] The nearly bankrupt Social Security Fund received no contribution from these workers or their employers.[8]

The use of temporary foreign workers by East Coast apple growers, rather than being restricted to a "crisis" situation in 1976 and 1977, was the product of the Secretary of Labor's ("Secretary") decision that U.S. workers who sought wages and benefits in excess of the regulations at 20 C.F.R. §§602.10-602.10b ("the Secretary's regulations") were unavailable. The Commissioner of the Immigration and Naturalization Service (INS) followed the Secretary's decision.

The First Circuit decision upheld the policy of the Secretary and the INS:

> The basic fact which the U.S. Secretary faced was the simple one that no Puerto Rican worker would come unless the employer agreed to meet conditions exceeding the U.S. conditions. We may agree with plaintiffs that the reason why is purely secondary; the question is the same whether the Puerto Rican workers' insistence upon P.R. conditions was made for them by the legislature or by the P.R. Secretary, or was

6. An apple picker can earn approximately $1,000 during the picking season.

7. At a minimum, 3% of the Jamaican worker's earnings are withhheld by the Jamaican government. Another 20% is held back as "compulsory savings," payable to the workers upon their return to Jamaica. See, Rifkin and Howard, "Who Should Play God?" *The Progressive* (Dec. 1977), p.39.

8. Under Social Security law, both worker and employer pay a percentage share into the social security fund. 26 U.S.C. §§3102, 3111. Temporary foreign workers and their employers are exempted from the withholding requirement. 26 U.S.C. §3121(6)(1).

> due to insistence by a union to which they all belonged, or was merely the result of Puerto Rican workers not finding the U.S. conditions sufficiently attractive, and demanding more on an individual basis. *Our decision covers all of these matters, and the statute only incidentally.* (Emphasis added.)[9]

This decision permits *all* agricultural employers to substitute temporary foreign workers for U.S. workers at wage rates and conditions lower than those sought by U.S. workers. Agricultural employers thus may refuse to negotiate with U.S. workers because they (the growers) are required by the Secretary, as a precondition to obtaining foreign labor, to offer U.S. workers only the terms and conditions which the Secretary prescribes by regulation.[10] Because the Carter Administration is planning a drastic expansion of the temporary foreign worker program to compensate for proposed sanctions on employers who employ illegal aliens, it is necessary to obtain this Court's review in order to clarify the standards applicable to the temporary foreign worker program. Otherwise, the number of U.S. workers who will lose jobs to cheaper foreign labor will increase into the hundreds of thousands.[11]

Petitioners, U.S. farmworkers from Puerto Rico, in 1976 and 1977, were willing, able and qualified to work as apple pickers in the East Coast apple harvest. However, in 1976, because they requested $.05 more per hour in wages and benefits than the Secretary's regulations required, all of these workers were declared "unavailable" for apple

9. See Appendix B.

10. See discussion, *infra*, part A of this petition.

11. "Alien Farm Help . . . US Plans Big Boost," THE SACRAMENTO BEE, August 31, 1977, p.1.

harvest work.

Petitioners filed the complaint in this case on October 29, 1976.[12] By the summer of 1977, it became apparent that U.S. workers were once again going to be put in the same predicament as occurred in 1976. Therefore, petitioners filed a motion for preliminary injunction in the district court on June 17, 1977. The preliminary injunction which was granted by the district court on August 15, 1977, stated that Puerto Rican workers were available to work in the apple harvest.[13] Thereafter, on August 22, 1977, the government filed a notice of appeal and a motion for a stay pending appeal with the First Circuit. A stay of the preliminary injunction was granted by the First Circuit on August 26, 1977. Oral argument was held on an expedited basis on October 4, 1977.

The First Circuit rendered its decision on December 28, 1977.[14] The decision upheld the Secretary by denying to all U.S. farmworkers the right to negotiate the terms and conditions of their employment. The court made it clear that the decision applied to all U.S. workers—whether from Texas, Florida, California, or Puerto Rico. The decision also applied to situations where the demand for better wages and working conditions arose out of union bargaining, individual negotiation, or state law. However, the decision (1) interferes with federal labor policy which promotes worker organization and negotiation, (2) conflicts with constitutional provisions protecting the right to

12. Federal jurisdiction was alleged *inter alia* under the commerce clause, 28 U.S.C. §1337 and under 28 U.S.C. §1343 for denial of rights guaranteed by the laws of the United States.

13. See Appendix A.

14. See Appendix B.

contract, and (3) conflicts with state laws designed to protect the collective bargaining rights of U.S. farmworkers.[15] Because of the need to protect the right of all United States workers to negotiate the terms and conditions of their employment without these negotiations being undermined by the availability of inexpensive foreign labor, this petition was filed.

REASONS FOR GRANTING THE WRIT

REVIEW BY THE COURT IS NECESSARY TO PREVENT AGRICULTURAL EMPLOYERS FROM USING FOREIGN WORKERS TO UNDERCUT THE WAGES AND WORKING CONDITIONS OF U.S. WORKERS, TO ALLOW U.S. WORKERS THE FREEDOM TO NEGOTIATE WAGES AND WORKING CONDITIONS, AND TO RECTIFY THE IMPROPER ADMINISTRATION OF THE IMMIGRATION LAW SO AS TO EFFECTUATE ITS PURPOSE TO PROTECT U.S. WORKERS.

A. Introduction: The Statutory and Regulatory Scheme

The Immigration and Nationality Act (INA), 8 U.S.C. §1101 *et seq.*, permits the admission of aliens to perform temporary agricultural labor if domestic workers cannot be found. The INA defines as a "non-immigrant" an alien who ". . . is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable

15. Because of the Supremacy Clause, this third issue has constitutional implications.

of performing such service or labor *cannot be found* in this country . . ." 8 U.S.C. §1101(a)(15)(H)(ii)[16] (emphasis added). A non-immigrant thus defined may be admitted upon a determination by the Attorney General after "consultation with appropriate agencies of the government" that the pertinent requirements are satisfied. 8 U.S.C. §1184(c). This determination has been delegated by the Attorney General to the INS and to the Secretary. The INS regulations require that an employer's petition for the admission of non-immigrant aliens to perform temporary service be accompanied by ". . . a certification from the Secretary of Labor . . . stating that qualified persons in the United States are not available and that the employment of the beneficiary [the foreign worker] will not adversely affect the wages and working conditions of workers in the United States similarly situated, or a notice that certification cannot be made . . ." 8 C.F.R. §214.2(h)(2).

The Secretary therefore, has been delegated the duty to determine whether (1) shortages of labor exist at given periods of time for given types of employment, and (2) even when those shortages do exist, whether the employment of foreign workers will adversely affect the wages and working conditions of U.S. workers. The Secretary is the logical choice to make a determination as to whether a labor shortage exists because of his supervision of the United States Employment Service (USES) within the Department of Labor. The USES coordinates the national system of state employment agencies, created by the Wagner-

16. It should be noted that the First Circuit incorrectly cited 8 U.S.C. §1182(a)(14) as the controlling statutory authority. See Appendix B, p. . This section governs the admission of laborers to the country as permanent residents, not as temporary non-immigrants.

Peyser Act, 29 U.S.C. §§49 *et seq.*, to help recruit U.S. workers and to match them with job openings.

In connection with the USES, the Secretary has established the foreign worker certification regulations at 20 C.F.R. §§602.10-10b. (Hereinafter, "the Secretary's regulations.") The intent of these regulations is to prescribe the minimum wages and working conditions[17] which must be offered to U.S. workers and to foreign workers.[18]

Puerto Rico is, and has been since 1952, an integral part of the employment service system. *See*, 29 U.S.C. §49b(b) and 8 U.S.C. §1101(a)(36). In 1975, 1976, and 1977, Puerto Rican workers sought to negotiate contracts which provided a wage rate equal to the Secretary's established minimum rate plus $.05 per hour in fringe benefits.[19] The Secretary declared all Puerto Rican workers unavailable merely because the workers had asked for $.05 per hour more than required by the Secretary's regulations. It was the Secretary's position that the growers could voluntarily choose to pay the $.05 but that, because the regulations did not contain this requirement, the Secretary could not force

17. 20 C.F.R. §602.10(d)(2) reads as follows:

> That reasonable efforts have been and will continue to be made by the Employment Service and the employers to obtain domestic workers at rates and conditions of employment *no less favorable* than those set forth in the regulations in this part . . . (emphasis added).

The First Circuit in Elton Orchards v. Brennan, 508 F.2d 493, 495 (1st Cir. 1974) stated that the Secretary's regulations prescribed minimum conditions.

18. The adverse effect wage rate and the other minimum conditions in the regulations clearly are designed "to prevent [an] adverse effect upon U.S. workers." 20 C.F.R. §602.10b. This aspect, however, is only one-half of the Secretary's duties referred to on p. 8 of this petition. The first duty is to determine whether a labor shortage exists.

19. See n.5, *supra.*

the growers to pay by denying foreign worker certification. By bargaining for better wages and working conditions, U.S. workers were declared unavailable for the apple jobs in question.[20] This decision conflicts with the purpose of 8 U.S.C. §1101(a)(15)(H)(ii) of the INA. The legislative history of that section makes it clear that "certain alien workers," among them agricultural workers, may be admitted temporarily ". . . for the purpose of *alleviating labor shortages* . . ." (emphasis added) H.R. Rep. No. 1365, 82d Cong., 2d Sess., p. 51, 1952 U.S. Code Cong. & Ad. News 1653, 1697-1698. In contrast thereto, the Secretary's policy created a labor shortage which actually did not exist.[21] There was no shortage of U.S. workers prepared to pick apples; rather, the shortage was created by the Secretary's declaration that U.S. workers—whether from Texas, Florida, California or Puerto Rico and whether in a union or not—who do not accept work on the terms contained in the regulations cannot be considered available to work. This interpretation of regulations which were intended to serve as minimum guidelines results in the denial of jobs to thousands of U.S. workers and is in direct

20. The mechanism for determining the availability of U.S. workers where temporary foreign workers are sought stands in contrast to the mechanism employed by the Secretary to determine the availability of U.S. workers where *permanent* foreign workers are sought. *See*, 20 C.F.R. §§656.21 and 656.24. Under these latter regulations, the Secretary determines the availability of U.S. workers based on a consideration of several factors, not solely on whether the U.S. worker will work at a predetermined wage rate. There is no reason that this mechanism cannot be adapted to the temporary regulations, using the "adverse effect rate" as a minimum guideline.

21. Petitioners do not challenge the regulations *per se* but, rather, the application by which the Secretary has, in effect, made the regulations maximum conditions, not minimum.

conflict with the purpose of the INA to protect U.S. workers in their jobs and to give them preference in hiring over foreign workers.

B. Review by the Court is Necessary to Avoid Interference with the Right of Workers to Bargain and Contract

The First Circuit decision has a national impact on labor relations. First, it is inconsistent with federal labor policy established by Congress, principally, through the Norris-LaGuardia Act, 29 U.S.C. §§101 *et seq.*, and the National Labor Relations Act, 29 U.S.C. §§151 *et seq.*; second, the decision is contrary to state laws which guarantee collective bargaining rights to agricultural workers.

1. Federal Labor Policy

It has always been deemed "a fundamental right of employees to organize and to bargain with their employers." *National Maritime Union of America v. Herzog*, 78 F. Supp. 146 (D.D.C. 1948, three-judge court) *aff'd mem.* 334 U.S. 854 (1948). This fundamental right was also established in the Norris-LaGuardia Act in which the public policy in labor matters was stated as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organiza-

> tion, and designation of representatives of his own choosing, *to negotiate the terms and conditions of his employment*, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . (emphasis added) 29 U.S.C. §101.

The Norris-LaGuardia Act prohibited U.S. courts from interfering with labor disputes (as defined in the Act) by way of issuance of restraining orders or temporary or permanent injunctions. 29 U.S.C. §§107-109.

Subsequently, the National Labor Relations Act (NLRA) added additional privileges and benefits—for example, the privilege of a union to become the exclusive bargaining agent of all employees of a particular bargaining unit and the requirement that employers bargain collectively with the chosen representative.

Certain activities between employer and employee were left unregulated by the NLRA, and this Court has held that Congress meant to leave these activities to the control of "the free play of economic forces."[22] *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976) (hereinafter *"Lodge 76"*). Thus, where Congress has not regulated or addressed a specific activity under the NLRA neither a state nor a federal agency may regulate that activity where such

22. This general rule is qualified to the extent that Congress and states may pass laws which guarantee minimum wages and working conditions. See, e.g., the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.*

regulation would "control the results of negotiations." *Lodge 76* at 143.[23]

Since the NLRA does not regulate bargaining[24] between agricultural employee and employer, 29 U.S.C. §152(3), Congress no doubt meant to leave this activity to the "free play of economic forces." *Lodge 76* at 140. Thus, although the Secretary of Labor has the power to promulgate minimum wages and working conditions for agricultural workers, he does not have the authority to "control the results of negotiations" between agricultural employee and employer. *Id.* at 143.

The Secretary violated federal labor policy by dictating the terms and conditions of employment of U.S. farmworkers. According to the Secretary's interpretation and the First Circuit's decision, once the employer offers the terms and conditions contained in the Secretary's regulations, the employer is free to refuse to negotiate, and may, instead, employ foreign labor. Under this system there is no free play of economic forces. The First Circuit decision denies to the farmworker the very tools—organizing, striking, collective bargaining—which Congress intentionally did not deny him and to which he has a fundamental right.[25] Because of this denial, the Court should review this case.

23. Citing S. Rep. No. 105, 80th Cong., 1st Sess., p.2.

24. "Bargaining" is not meant to be a term of art; rather, it is meant to encompass any and all formal and informal processes by which employers and workers arrive at contract terms.

25. The regulations, by placing a limit on negotiation, act very much like the restraints which the Congress, through the Norris-LaGuardia Act, prohibited the courts from imposing.

2. State Collective Bargaining Laws.

State regulation of bargaining between farmworker and employer is acceptable to a limited extent. *See*, Section B(1), *ante.* Accordingly, several states have collective bargaining laws[26] which expressly declare the right of farmworkers to organize and require the employer to recognize and bargain with the appropriate bargaining agent. If the First Circuit's decision prevails, otherwise valid state collective bargaining laws will conflict with the INA, raising the constitutional question of the preemption of these state laws under the Supremacy Clause.

Because of the First Circuit decision, the agricultural employer will never have to bargain under state law. Instead, before a contract is negotiated, a job offer will be placed into the interstate clearance system stating that the terms and conditions of employment will be those listed in the Secretary's regulations. Any union will have to accept the grower's terms or be replaced by foreign workers who will work for wages and working conditions below those requested by the union.

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26. These states are Arizona, the Agricultural Employment Relations Act, Ariz. Rev. Stat. §23-1381 *et seq*; California, Agricultural Labor Relations Act, California Labor Code §1140 *et seq*; Hawaii, Hawaii Rev. Laws §377-1(13); Idaho, Agricultural Labor Act, Idaho Code 22-4101, *et seq*; Kansas, Agricultural Relations Act, Kan. Stat. §44-818 *et seq*; Wisconsin, Wis. Stat. Anno. §111.03; Puerto Rico, Constitution of Puerto Rico, Article II, §17 and 29 L.P.R.A. §§41 *et seq*. On March 13, 1978, the Puerto Rico Supreme Court dismissed as improvidently granted a Writ of Revision in Shade Tobacco Growers Association v. Puerto Rico Labor Relations Board, No. 0-76-132. This dismissal leaves standing a decision of the Puerto Rico Labor Relations Board which upheld the jurisdiction of the Labor Relations Board over collective bargaining between Puerto Rico's agricultural workers and U.S. growers who recruit workers in Puerto Rico.

C. The Secretary's Regulations, as Interpreted, Interfere with Farmworkers' Rights to Contract as Protected by the Fifth and Fourteenth Amendments to the Constitution.

In *Lochner v. New York*, 198 U.S. 45 (1905), this Court struck down a New York statute which established that bakers could not be required or permitted to work more than 10 hours a day. The Court stated that the general rule applicable was "the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to." *Id.* at 63, 64. Governmental interference with these rights could only be tolerated to the extent that public concern and necessity required it.[27] Public concern must be oriented to the safety, health, morals and general welfare of the public.

In the instant case, neither the Secretary nor the First Circuit advanced a public necessity rationale to support the establishment of maximum wage rates and working conditions; nor could such a rationale be proffered without first establishing that maximum guidelines were necessary to prevent agricultural employers from going bankrupt. But no such record was established. Therefore, petitioners request this Court's review in order to clarify the right to contract for U.S. farmworkers.

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27. It is public necessity which supports minimum wage legislation. *See*, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Adkins v. Children's Hospital, 261 U.S. 525 (1923), dissenting opinion of Mr. Justice Holmes. *Adkins* was expressly overruled by *West Coast Hotel Co. v. Parrish.*

CONCLUSION

This petition presents important issues regarding the welfare of U.S. farmworkers. Unless this Court corrects the policies described herein, foreign labor will displace more and more U.S. farmworkers as employers realize that they may legally use foreign workers to keep wages and working conditions low. Therefore, a writ of certiorari should be issued to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF PUERTO RICO

REINALDO HERNANDEZ
FLECHA, et al.,
Plaintiffs

vs. CIVIL NO. 76-1382

HON. LUIS SILVA
RECIO, et al.,
Defendants.

OPINION AND ORDER

On July 21, 1977, we referred the above captioned case to the United States Magistrate for proceedings, report and recommendation of plaintiffs' motion for preliminary injunction. Said Report was filed on August 12, 1977, and the matter stands now submitted for our final decision as to whether a preliminary injunction shall be issued in this action.

ANALYSIS

FINDINGS OF FACT

The United States Magistrate has filed a very detailed recommendation as to the Findings of Fact to be made

in this case. After an independent study of the record of the case we hereby adopt said Findings of Fact as offered by the Magistrate and the same shall be part of this Opinion, as prescribed by Rule 52 of the Federal Rules of Civil Procedure.

CONCLUSIONS OF LAW

We are here faced with the question of whether or not this Court should issue temporary injunctive relief upon the above determination of facts. As stated by the U.S. Magistrate, the general doctrine in this regard is that for a court to issue a temporary injunction a showing must be made by plaintiffs that there is substantial likelihood that they will succeed on the merits and, more important, that irreparable harm would flow from a denial of their request. The Court must also have in mind the inconveniences that the granting of the preliminary injunction would cause the opposing party and the public interest involved. *Pauls v. Secretary of Air Force*, (1st Cir., 1972) 457 F.2d 294, 298; *State of Maine v. FRI* (1st Cir., 1973) 486 F.2d 713, 715.

The above enunciation of the law together with a consideration of the facts of the present case lead us to conclude that any delay in a determination of the question of whether Puerto Rican agricultural workers are available for the 1977 harvest will cause irreparable injury to some or all of the class of plaintiffs in this case inasmuch as it would reduce the number of Puerto Rican workers capable of being recruited. Plaintiffs have also pointed out that those workers that would not get

to be recruited for the 1977 harvest will lose wages without any opportunity of recovering them by suing the growers or the Department of Labor for lost wages (damages).

We agree with the U.S. Magistrate that plaintiffs herein have shown that they are likely to succeed on the merits of this matter under the holding of *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493 (1st Cir., 1974).

As stated in the Report now before us:

> "11) The balancing of the equities in this case in our opinion, leans toward the plaintiffs. They have everything to lose. As in the past two years, plaintiffs face the perspective of not being able to work in the coming harvest season. . . .
>
> 12) In our opinion, the public interest favors a decision granting the preliminary injunction. The public interest in this case is expressed in the Immigration and Nationality Act which states the premise that domestic workers are to be preferred for U.S. jobs over foreign workers. See *Elton Orchards v. Brennan*, supra at 500. To establish a ruling at this point which would put Puerto Rican workers in a position inferior to foreign workers would be to negate immigration law and policy."

We need not delve any further into the merits of the case at the present moment. An evaluation of the equities and a finding of a likelihood of plaintiff's success in the present case lead us to conclude that the temporary relief herein requested should be granted.

In view of all of the above, plaintiffs' motion for preliminary injunction is hereby GRANTED against the defendants enjoining the U.S. Secretary of Labor to declare the availability of Puerto Rican workers for the

1977 apple harvest with the full protections of Public Law 87 of 1962; the U.S. Secretary of Labor is further restrained from certifying any apple grower's request for the use of temporary foreign workers to harvest apples, unless available workers from Puerto Rico do not accept all the available job openings; the Commissioner of the Immigration and Naturalization Service is enjoined to recognize the availability of Puerto Rican workers for the 1977 apple harvest with the full protections of Public Law 87; the Commissioner of the Immigration and Naturalization Service is restrained from issuing visas to temporary foreign workers to harvest apples in the 1977 harvest unless available workers from Puerto Rico do not accept all available job openings. The above order against defendants shall remain in effect pending the determination of this action or until further order of this Court. In view of the fact that plaintiffs have been granted leave to proceed without prepayment of costs, they shall not be required to post a bond for the issuance of this order.

IT IS SO ORDERED.
San Juan, Puerto Rico, August 15, 1977.

/s/ Jose V. Toledo
JOSE V. TOLEDO
Chief U.S. District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 77-1401

REINALDO HERNANDEZ FLECHA et al.,
Plaintiffs, Appellees,

v.

HON. CARLOS QUIROS, etc.,
Defendant, Appellee.

F. RAY MARSHALL,
U.S. SECRETARY OF LABOR, et al.,
Defendants, Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[HON. JOSE V. TOLEDO, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
Aldrich, *Circuit Judge*,
and Crary, *District Judge*.*

Jonathan H. Waxman, Acting Counsel for Litigation, with whom *Carin Ann Clauss*, Solicitor of Labor, *Nathaniel Baccus III*, Associate Solicitor for Employment and Training, *Morton J. Marks*, Regional Attorney, *Mary Asseo* and *Steven M. Guttell*, Attorneys, were on brief, for appellants.

*Of the Central District of California, sitting by designation.

S. Steven Karalekas and *Thomas J. Bacas* on brief for Farm Labor Executive Committee, amicus curiae.

Luis N. Blanco Matos, with whom *Salvador Tio, Howard S. Scher, Burton D. Fretz*, and *Alan J. Rom* were on brief, for appellees.

December 28, 1977

Aldrich, *Senior Circuit Judge.* In this action for an injunction, and a declaration of rights, there has been a considerable past history that is sought to be used by the various parties to reflect on others. We disregard it as irrelevant, and turn to the single question of substance, which, we agree with plaintiff, appellees, is not moot. This is whether Puerto Rican workers, because of their special demands, are to be excluded from the pool of "available" domestic workers when determining the number of alien workers needed for certain migrant agricultural work. The district court issued a preliminary injunction requiring defendant United States Secretary of Labor, U.S. Secretary, to declare the Puerto Rican workers available, and enjoining defendant Commissioner of the Immigration and Naturalization Service, INS, from issuing temporary work visas. We stayed the injunction, and now consider the merits. Plaintiffs are agricultural workers residing in Puerto Rico. A further named defendant is the Puerto Rico Secretary of Labor, P.R. Secretary.

The problem arises in this manner. Certain private activities in the several states, in this instance apple growing in a number of Eastern states, require many temporary workers, here apple pickers, for a short and

specific interval. The demand often exceeds the local supply, and the growers look elsewhere, including abroad. We start with a given, that it has always been a Congressional policy to prefer domestic workers in all fields. However, it is also necessary to consider would-be employers, although in case of conflict, wide leeway favoring domestic workers is given the U.S. Secretary. *Elton Orchards, Inc. v. Brennan*, 1 Cir., 1974, 508 F.2d 493 (apple growers); *cf. Silva v. Secretary of Labor*, 1 Cir., 1975, 518 F.2d 301 (live-in maid). Domestic workers are preferred in the matter of hiring, so long as there are any "who are able, willing, qualified, and available." 8 U.S.C. §1182(a)(14)(A). In order further to protect domestic workers and their working conditions, as required by subsection (14)(B), employers of both domestic and alien workers are obliged to maintain certain minimum wage and other standards determined by the U.S. Secretary, hereinafter U.S. conditions. 8 U.S.C. §§1101(a)(15)(H)(ii), 1184(c) (1970); 20 C.F.R. §§602.10-10b (1977). At the same time, under the statute, employers are protected by permitting the admission of aliens when there is no supply of domestic workers who are "able, willing, qualified, and available." The question is whether a domestic worker who demands more than the U.S. conditions falls within this statutory definition.

The present difficulty was created by the Puerto Rico legislature's enactment of Public Law 87 of 1962, as amended in 1977, forbidding the P.R. Secretary to contract with the U.S. Secretary to release Puerto Rican residents for itinerant work except upon conditions, hereinafter P.R. conditions, more onerous to the employer than those set by the U.S. Secretary. Since

none could come without his permission, the P.R. Secretary's insistence upon these conditions led to a determination by the U.S. Secretary that no Puerto Rican workers were "available." The U.S. Secretary accordingly computed the quotas of apple pickers without reference to Puerto Rico. Plaintiffs responded with this suit, and obtained the preliminary injunction which we stayed.

Plaintiffs, at the outset, contend that P.L. 87 and its constitutionality are not involved. In a sense, this is so. The basic fact which the U.S. Secretary faced was the simple one that no Puerto Rican worker would come unless the employer agreed to meet conditions exceeding the U.S. conditions. We may agree with plaintiffs that the reason why is purely secondary: the question is the same whether the Puerto Rican workers' insistence upon P.R. conditions was made for them by the legislature, or by the P.R. Secretary, or was due to insistence by a union to which they all belonged, or was merely the result of Puerto Rican workers not finding the U.S. conditions sufficiently attractive, and demanding more on an individual basis. Our decision covers all these matters, and the statute only incidentally.

It is plaintiffs' position that the U.S. conditions are merely a minimum, and that they neither forbid employers offering more, nor employees from seeking more. We agree with this, but it does not follow, as plaintiffs would seem to think, that if the workers are unwilling—or unable—to come unless they receive more, they meet the section 1182(a)(14)(A) definition. If they did, it requires but little reflection to see that the statute would be used to require employers to meet

whatever demands might be made by domestic workers. The effect, indeed, the necessary effect, would be that the alien market would never be reached—the employer would have to pay whatever the domestic workers sought, it being obvious that if there were no limit on the price that could be asked, workers could always be found. In fact, the right of workers to demand what they wish is the whole basis of plaintiffs' claim—that the U.S. Secretary's interpretation means that "the [U.S.] Secretary usurps the power of the domestic worker to negotiate. . . ."[1]

The statute, however, is not a one-way street. The Court of Appeals for the Third Circuit, recently faced with a somewhat similar situation in the Virgin Islands, recognized that there are two statutory purposes.

> "The common purposes are to assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force." *Rogers v. Larson*, 3 Cir., 1977, 563 F.2d 617, 626.

The attmpt in plaintiffs' brief to read the statute otherwise is based upon the claim that since the Puerto Rican workers are fully prepared to go if the P.R. conditions are met, they are "ready, willing and able,"

[1] "Negotiate" here means only negotiate up. A recent Puerto Rico Superior Court decision denies power to negotiate away any of the P.R. conditions. *Villanueva v. Quiros*, Civil No. PE 77-1304 9/26/77.

and hence are "available."[2] Quite apart from conflicting with what we regard as the statute's intent, this is giving the work "willing" an unnatural meaning. A person who is willing only if certain conditions are met is not "willing and available." On the contrary, by hypothesis, he *would be willing, if.* To carry plaintiffs' ignoring conditions to its logical extent, we ask whether the cynic who said that every man has his price would say that every man is "willing and available"? If so, the phrase is meaningless. If not, the injection of any condition is a denial of ready willingness; there is no intermediate position.

We assume, for present purposes only, that Puerto Rico can forbid its residents to accept employment elsewhere except upon conditions determined by Puerto Rico. Even so, Puerto Rico cannot pass laws, such as minimum wage laws, for other jurisdictions. The Puerto Rico legislature may be dissatisfied with the U.S. standards, but it cannot reject those standards and at the same time insist on the benefits of the federal statute. The purpose of the statute and regulations relating to temporary workers is not to open the door for bargaining nationwide—if by Puerto Rico, it could be by every state—but to provide a manageable scheme, which that clearly would not be, that is fair to both sides. Puerto Rico may participate, or not, as it chooses, but it cannot set the terms. It is Congress which, under the Constitution, has the final say in matters of interstate commerce, and its lawfully

[2] "Puerto Rican workers were, in fact, 'available' to do apple harvest work because they were physically ready, willing and able to do such work."

delegated agencies that determine fair conditions of employment in interstate commerce, and neither Puerto Rico, nor any individual state.

There remains the question of relief. Technically, this is an appeal from the granting of a preliminary injunction. With the passage of the 1977 apple season, the granting of that injunction is obviously mooted. What is not mooted is the meaning of the federal statute and regulations, and since this is a question of law, not of fact, we may decide the merits. The case is remanded to the district court to enter a judgment in an appropriate form declaring that a worker who is not able and willing to enter into a contract of employment upon the U.S. conditions is not available within the statutory meaning when the U.S. Secretary is certifying the need for temporary foreign workers to the INS.

APPENDIX C

1. 8 U.S.C. §1101(a)

As used in this chapter–

* * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens–

* * * *

(H) an alien having a residence in a foreign country which he had no intention of abandoning. . . .

* * * *

(ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country;

2. 8 U.S.C. §1184(c)

The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

3. 29 U.S.C. §49 *et seq.* (pertinent text only):

a. §49. United States Employment Service; bureau established; transfer of records, employees, etc., of existing employment service

In order to promote the establishment and maintenance of a national system of public employment offices there is created a bureau to be known as the United States Employment Service.

b. §49b. Employment offices; development of national system; veterans' service; "State" defined

(a) It shall be the province and duty of the bureau to promote and develop a national system of employment offices for men, women, and juniors who are legally qualified to engage in gainful occupations, including employment counseling and placement services for handicapped persons, to maintain a veterans' service to be devoted to securing employment for veterans, to maintain a farm placement service, and, in the manner hereinafter provided to assist in establishing and maintaining systems of public employment offices in the several States and the political subdivisions thereof in which there shall be located a veterans' employment service. The bureau shall also assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and

publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States.

(b) Whenever in sections 49 to 49c, 49d, 49g, 49h, 49j, and 49k of this title and section 338 of Title 39 the word "State" or "States" is used, it shall be understood to include Puerto Rico, Guam, the District of Columbia, and the Virgin Islands.

4. 8 C.F.R. §214.2(h)(3) (pertinent text only):

Petition for alien to perform temporary service or labor—(i) *Labor certification.* Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a) (15) (H) (ii) of the Act. A certification by the Employment Service of the Territory of Guam will be accepted in lieu of that issued by the Secretary of Labor or his designated representative in connection with a petition for employment of laborers in Guam. If there is attached to the petition a notice from the Secretary of Labor or his designated representative that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the

United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

5. 20 C.F.R. §§602-602.10b (pertinent text only):

a. §602.2 Placement services.

(a) *Functions.* Each State Agency shall maintain, through its State and local employment offices, a placement service for the free use of employers, workers, and veterans and for the purpose of assisting employers to secure the number of workers possessing the occupational qualifications such employers require, and of assisting all workers to find promptly, jobs for which they are occupationally qualified and which are most advantageous to them. The State service shall promote the full use of its placement facilities, for the purpose of assuring the maximum of job opportunities for veterans and other workers and the maximum recruitment and placement assistance for employers.

* * * *

(c) *Inter-area and interstate clearance of labor.* Each State agency shall cooperate with the United States Employment Service in the interstate recruitment and transfer of workers. Each State agency shall maintain an adequate system for the recruitment and transfer of workers between areas within the State.

* * * *

b. §602.8 Agricultural and related industry placement services.

(a) Each State agency, in carrying out the provisions of the Wagner-Peyser Act, shall maintain, through its State administrative office and local employment offices, effective placement services for agricultural and related industry employers and workers, and such services shall include appropriate programs for the intrastate recruitment and transfer of workers and for cooperation with the United States Employment Service in the interstate recruitment and movement of workers.

d. §602.10 The certification processes.

(a) Section 214.2(h)(3) of the Immigration and Naturalization Service Regulations (8 CFR 214.2(h)(3)) requires, in support of a petition for the admission of an alien to perform certain temporary service or labor, that

> Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a) (15) (H) (ii) of the Act.

* * * *

(b) Agricultural or logging employers including association employers anticipating a labor shortage may

request a certification for temporary foreign labor, provided that the employer or the association and those of its members for whom the services of foreign workers are requested, prior to making such a request, have filed at the local office of the State employment service an offer of employment for U.S. workers to fill such employment needs in accordance with the provisions of this section and §§602.10a and 602.10b. Such offers of employment, as well as any request for certification for temporary foreign workers, should be filed at the local office in sufficient time to allow the ETA 30 days to determine the availability of domestic workers, in addition to the time necessary for the employer to secure foreign workers by the date of need if the certification is approved.

(c) Request for certification shall be in writing and describe all efforts made by the employer to obtain U.S. workers to fill the employer's need.

(d) When received, the request for certification shall be forwarded by the local office of the State employment service to the appropriate RAETA together with information which indicate the extent to which the requirements set forth in this section have been met and a detailed report of labor availability, recruitment efforts undertaken by and on behalf of those requesting the use of foreign workers, and any other information required by the ETA. The RAETA may then issue the certification if he finds:

(1) That the employment of such workers will not adversely affect the wages and working conditions of domestic workers similarly employed; and

(2) That reasonable efforts have been and will continue to be made by the Employment Service and

the employers to obtain domestic workers at wage rates and conditions of employment no less favorable than those set forth in the regulations in this part, to perform the work for which the services of temporary foreign workers are requested, and for which domestic workers are not available.

* * * *

e. **§602.10a Job offers and contracts.**

The offers to U.S. workers made in accordance with this section and §602.10(b) shall:

(a) Be in writing (except with regard to workers who commute on a daily basis between their residence and the place of employment) and when accepted shall take the form of a written contract.

* * * *

(b) Provide for housing for the employees without charge in accordance with the standards issued by the Secretary of Labor as set forth in §602.9. If the prevailing practice in the area of employment is to provide family housing, such housing must be provided;

* * * *

(c) Provide, at no cost to workers for insurance covering injury and disease arising out of and in the course of the workers' employment where such workers are not covered by workmen's compensation under State law.

* * * *

(d) Provide for the furnishing of all tools, supplies or equipment required to perform the duties assigned without cost to the worker;

* * * *

(e) Permit only the following deductions from wages: (1) Those required by law; (2) those for advance against wages; (3) payment for articles of consumption produced by the employer which the worker has purchased; (4) value of meals supplied by the employer but not to exceed amounts specified in paragraph (f) of this section; (5) overpayment of wages; (6) any loss to the employer due to a worker's refusal or negligent failure to return any property furnished to him by the employer, or due to such worker's willful destruction of such property; (7) deductions for transportation and subsistence costs paid for by the employer as provided in paragraph (g) of this section.

* * * *

(f) Permit no charge by the employer in excess of $2.55 per worker for furnishing 3 meals per day except where the Administrator, when evidence submitted to him of average actual cost for a representative pay period supports a greater charge, has approved a charge not to exceed $4.00 per worker for furnishing three meals per day.

* * * *

(g) Require the employer to provide or pay for transportation and subsistence en route from the place of recruitment to the place of employment in those cases where the worker completes at least 50 percent of the contract.

* * * *

(h) Guarantee each worker the opportunity for employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the worker's arrival at the place of employment and ending on the termination date specified in the work contract, or its extensions, if any.

* * * *

(j) Provide for the payment of not less than the wage rates prescribed in §602.10b.

f. **§602.10b Wage rates.**

(a)(1) Except as otherwise provided in this section, the following hourly wage rates (which have been found to be the rates necessary to prevent adverse effect upon U.S. workers) shall be offered to agricultural workers in accordance with §602.10a(j):

State:	*Rate*
Connecticut	
Florida (sugar cane only)	
Maine	
Maryland	
Massachusetts	
New Hampshire	
New York	
Vermont	
Virginia	
West Virginia	

(2) Piece rates shall be designed to produce hourly earnings at least equivalent to the hourly rate specified

in subparagraph (1) of this paragraph for the State in which the work is to be performed and no workers shall be paid less than the specified hourly rate.

(b) Where the prevailing rate for a crop activity in an area of employment is higher than the wage rate otherwise applicable under paragraph (a)(1) of this section, such higher prevailing rate shall be offered and paid.

* * * *

(e) Upon application to, and approval by, the Secretary of Labor in each case, an agricultural employer may use piece rates which are designed to, and do, produce earnings by his employees engaged in the type of work covered by the job offer or contract, the average of which for the weekly or biweekly period is 25 percent higher than the hourly rates applicable under paragraph (a) of this section for agricultural workers. Should the average of the hourly earnings of such employees fall below this requirement, each worker's earnings for each payroll period within such weekly or biweekly period must be increased by the percentage needed to bring the total average to this requirement.

(f) Where both U.S. and foreign workers are engaged in the same tasks, wage rates that favor one such group and thereby discriminate against the other may not be paid.